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SELVA KUMAR TAMIL SELVOM

v.

TIMBALAN MENTERI DALAM NEGERI & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
ABDULL HAMID EMBONG J
[CRIMINAL APPLICATION NO: 44-67-2004]
10 APRIL 2005

C ***PREVENTIVE DETENTION:*** *Detention order - Application for habeas corpus - Whether grounds for application restricted to grounds of non-compliance with procedural requirements only - Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3, 4*

PREVENTIVE DETENTION: *Detention order - Power of Minister -*
D *Whether power of Minister to issue detention order distinct from power of Attorney-General to institute Criminal proceedings - Judicial review of Minister's decision to issue detention order - Whether grounds for review restricted to grounds of non-compliance only - Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3, 4*

E ***PREVENTIVE DETENTION:*** *Detention order - Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Challenge to validity of detention order - Non-compliance by police on certain procedural prerequisites and defects in forms used - Whether validity of detention order made by Minister can be questioned - Ouster clause under s. 7C thereof -*
F *Previous irregularities not a basis for determining whether Minister's order is illegal or not*

PREVENTIVE DETENTION: *Detention order - Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4 - Application for habeas corpus*
G *- Approach of courts - Determination of non-compliance - Whether defects in administrative forms used are mere technicality - Whether such defects will be a basis for censuring legality of pre-section 4 detention*

ADMINISTRATIVE LAW: *Remedies - Habeas corpus - Preventive detention - Whether detention order bad in law - Inordinate time lag between criminal*
H *activities and detention order - No specific complaint raised by applicant in his affidavit on question of delay - Extension order made - Whether court can consider issue of delay - Whether habeas corpus to issue*

I The applicant sought for his release from his detention under s. 4(1) of the Emergency (Public Order and the Prevention of Crime) 1969 Ordinance (the Ordinance) by way of an application for a writ of *habeas corpus*. Counsel for the applicant raised three issues: (i) failure to comply with s. 3(3)(b) of the Ordinance in that a police officer with the rank

of an Assistant Superintendent of Police (ASP) had not authorized the detention of the applicant; (ii) that the detention was not in conformity with the substantive procedural requirement under s. 3(3)(a) of the Ordinance. It was contended that the form made under s. 3(3)(a) was not addressed to any particular person in authority in order to further detain the applicant; and (iii) that the Minister's order was bad in law since there was an unexplained delay of 2 1/2 months. The last criminal activity of the applicant was recorded as of 27 March 2002 and the Minister's initial order of detention was signed on 13 June 2002 and an extension order was signed on 14 June 2002.

Held (dismissing the application):

(1) As the period of detention is prolonged, an officer of a higher ranking needs to authorize that detention. The administrative forms used need not be addressed to anyone as they are merely proof that these powers are indeed exercised by a proper ranking officer. Any defects in those forms are a mere technicality with no legal impact on the exercise of those powers. They cannot and should not be considered as a basis for censuring the legality of the pre-section 4 detention. (para 4)

(2) The notice of motion was filed on 23 September 2004 and no specific complaint was raised by the applicant in his affidavit on the question of delay. To come to court now, after an extension order had been made and complaining about the Minister's earlier alleged slip-up, was itself a delay on the part of the applicant. (para 5)

(3) There was no complaint made by the applicant on the non-compliance by the Minister of any procedural requirements. The application was grounded on the non-compliance by the police on certain procedural prerequisites and alleged defects in the forms used. It was therefore outside the court's jurisdiction to now question the detention order of the Minister. Once the detention order is made pursuant to his subjective satisfaction under s. 4 of the Ordinance, the court, in view of the ouster clause under s. 7C of that Ordinance, is barred from reviewing that order unless it can be shown that there has been non-compliance of any procedural requirement governing such detention. None was shown here. (paras 10 & 13)

(4) The detention by the police pending enquiries under s. 3 of the Ordinance even if smudged with procedural irregularities forms no basis to the detention order of the Minister under s. 4 and the latter order supersedes the former, with the effect that those previous irregularities could not now be a basis for this court's consideration

A in determining whether the Minister's order is illegal or not. The actions under ss. 3 and 4 operate independently of each other. (para 14)

Case(s) referred to:
Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 ***(refd)***
B *Kerajaan Malaysia & Ors v. Nasharuddin Nasir [2004] 1 CLJ 81 FC* ***(refd)***
Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals [2004] 4 CLJ 314 ***(refd)***
Morgan Perumal v. K/L Hussein Abdul Majid & Ors [1998] 3 CLJ 629 CA ***(refd)***

C **Legislation referred to:**
Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(3)(a), (b), (c), 4(1)
Internal Security Act 1960, ss. 3, 7C(1), 8

For the appellant - Abd Shukor Ahmad; M/s Shukor Baljit & Partners
D *For the defendants - Najib Zakaria; SFC*

Reported by Amutha Suppayah

JUDGMENT

E **Abdull Hamid Embong J:**

[1] The applicant seeks for his release from his detention under s. 4(1) of the Emergency (Public Order and the Prevention of Crime) 1969 Ordinance (the Ordinance) by way of an application for a writ of F *habeas corpus*. The detention order of the minister is dated 13 June 2002. Encik Abdul Shukor Ahmad of counsel for the applicant raised three issues:

1. Failure to comply with s. 3(3)(b) of the ordinance in that a police officer with the rank of an Assistant Superintendent of G Police (ASP) had not authorized the detention of the applicant. According to learned counsel the respondent had only filed two affidavits under s. 3(3)(a) and (c) pertaining to the authorization of the applicant's detention for more than 24 hours and more than 30 days under those respective subsections. As such the detention H *vide* s. 3(3)(b) was unlawful.

2. Secondly, it was alleged that the detention was not in conformity with the substantive procedural requirement under s. 3(3)(a) of the ordinance. Learned counsel referred to the form made under I s. 3(3)(a) as exhibited by the respondent. That form is now reproduced, as follows:

Pengesahan Penahan Lanjutan Dibawah Seksyen 3(3)(A) Atas Tangkapan Orang Yang Disyaki Dibawah Seksyen 3 Ordinan Dharurat (Ketenteraman Awam Dan Mencegah Jenayah) 5/69

Bahawa saya, Buba Garan Balakrishnan 1/12152, Inspektor Ibu Pejabat Kontinjen Perak, berpuashati berkenaan kes terhadap Selva Kumar a/I Tamil Selvom, No. KP (lama) ... (Baru) 780228-14-5151 yang telah ditangkap dibawah Seksyen 3 Ordinan Dharurat (KA & MJ) 1969 pada 18.4.2002 jam 1600 hrs di Perkarangan Mahkamah Majistret Batu Gajah, Jalan Changkat, Batu Gajah, Perak bahawa penyiasatan-penyiasatan perlu tidak dapat disempurnakan dalam tempoh 24 jam, maka oleh kerana itu, dengan menjalankan kuasa-kuasa yang diberikan kepada saya dibawah Seksyen 3(3)(a) Ordinan Dharurat (KA & MJ) 1969, maka saya dengan ini memberi kuasa supaya orang yang disyaki seperti namanya diatas dilanjutkan tahanannya selama 24 jam bermula dari jam 1600 hrs pada 19.4.2002.

Tarikh: 19.4.2002 - 1340 hrs

tt:
(Buba Garan 8.K) C/INSP
Inspektor D7A(3)
JSJ (D7) IPK
Perak

[2] Learned counsel contended that this form was not addressed: to any particular person in authority in order to detain the applicant for a further 24 hours. The case of Rasid bin Kulop Mohamad (PJ 44-69-2003, unreported) was referred to me. In that case the learned judge classified s. 3(3) of the Ordinance into two parts which he termed as "procedurally procedure and procedurally substantive". The former classification includes 'technicalities' such as errors found in the forms used. His lordship held that such errors are "procedurally procedure" defects and would not invalidate the detention order since it does not result in "gross injustice" to the detainee. I am in agreement with this part of the judgment. However the learned judge in that case went on to say that the form used under s. 3(3)(a) must be directed to someone in authority to detain the detainee for a further 24 hours and any omission to address this form to that person would be a "procedurally substantive" defect under the earlier classification referred to. As such, that order for the 24 hour detention would make the arrest and detention unlawful. Here, I respectfully depart from that finding.

[3] Section 3(3) of the Ordinance is now reproduced for easy reference. It states:

A (3) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order of detention having been made in respect of him under section 4(1):

Provided that:

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(a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;

(b) he shall not be detained for more than forty-eight hours C except with the authority of a police officer of or above the rank of Assistant Superintendent;

(c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to D the Inspector-General of Police or to a police officer designated by the Inspector-General in that behalf and the Inspector-General or the police officer so designated by him, as the case may be, shall forthwith report the same to the Minister.

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[4] From my reading and understanding of s. 3(3)(a) or (b), there is no requirement for the form of further detention to be addressed to any specific authority. Both sub-sections are, in my view, purely enabling provisions, to authorize police officers of certain ranks to further detain a suspect. In my view it would be stretching the interpretation of those F subsections to say that the forms made under them need to be addressed to someone. Perhaps the last phrase in the penultimate line "maka saya dengan ini memberi kuasa" pose some misunderstanding since this phrase seems to indicate that the officer signing the form is authorizing someone else for the extended detention. Such interpretation G however is not in tandem with the scheme under s. 3 of the ordinance. This section empowers any respective police officers to detain a suspect for up to a maximum of 60 days (see s. 3(3)(c)) and each of the sub-sections of s. 3(3) requires a police officer of specific rankings to exercise these tiered – powers of detention. Nowhere under those H subsections requires that the related forms be addressed to anyone. The forms used such as the one above in exh. "BG 1" are merely administrative forms to put on record that that designated officer of a certain ranking had exercised the power given to him under subsection (3). These forms are merely for record and convenience. I They are not statutory forms which required rigid compliance to the strict letter of the law. Subsection (3) does not refer to any forms to

be used when these officers exercise their powers. It is noted that as the period of detention is prolonged, an officer of a higher ranking needs to authorize that detention. Such is the scheme under s. 3 of the ordinance that the law requires for each step of detention of a longer period a police officer of a higher ranking needs to consider and authorize its extension. Parliament must have considered the pitfalls of such powers to detain without trial and provided for these safeguards to ensure that those powers are not overzealously exercised. Subsection (3)(c) even provides that any detention of over 30 days must be forthwith reported by the Inspector General of Police (or his designated officer) himself to the minister. The administrative forms used need not be addressed to anyone as they are merely proof that these powers are indeed exercised by a proper ranking officer. Any defects in those forms are such, a mere technicality with no legal impact on the exercise of those powers. They cannot and should not be considered as a basis for censuring the legality of the pre-section 4 detention. The powers given to the police under s. 3 of the ordinance may be draconian but Parliament meant for it to be harsh.

[5] The third ground was on delay. It was submitted that the minister's order was bad in law since there was an unexplained delay of 2 1/2 months when the order was initially made in June 2002. The last criminal activity of the applicant was recorded as of 27 March 2002, and the minister's initial order of detention was signed on 13 June 2002. An extension order was signed on 14 June 2002, immediately upon the expiry of the initial order. This notice of motion was filed on 23 September 2004 and no specific complaint was raised by the applicant in his affidavit on the question of delay or staleness of the allegations against the applicant when the initial order was made, save for the general averment that the minister had acted mechanically and that the order was made *male fide*. To come to court now, after an extension order had been made and complaining about the minister's earlier alleged slipup, now, is in my view, itself a delay on the part of the applicant. Learned counsel had referred to *Morgan Perumal v. K/L Hussein Abdul Majid & Ors*. [1998] 3 CLJ 629 CA and made reference to the following paragraph in support of his argument:

> It is also contended that there was a long delay or a large gap between the dates of the criminal activities alleged against the appellant and the date of the detention order. From the list of allegations upon which the Deputy Minister based the detention order, it would appear that all the alleged criminal activities occurred from August 1993 until about April 1994 but the detention order was only issued in March 1996. There is, therefore, a gap of some two years. No one sought to explain this long delay. While it is not disputed that generally detention

A orders are issued based on past criminal activities but those activities must be proximate to the date of the detention order to justify its validity. In *Yeap Hock Sens @ Ah Sens v. Minister for Home Affairs & Ors.* [1975] 2 MLJ 279, there was a similar delay of some four and a half months. Abdoolcader J. (as he then was) commented (at p.283) that:

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> These past activities should, however, ordinarily be proximate in point of time to justify the detention order.

In *Yip Hon Kit v. Minister of Home Affairs, Malaysia & Anor.* [1988] 2 MLJ 638, when the criminal activities alleged were in the years 1983 C and 1984 while the detention order was issued in February 1986, Edgar Joseph Jr. J. (as he then was) at p. 647 held that:

> Accordingly, I hold that the criminal activities alleged against the applicant are too remote in point of law to justify the making of the detention order.

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In the present case, as mentioned earlier, the criminal activities of the appellant were some two over years from the date of the detention order. In the absence of any explanation, we would also hold that they are far too remote to justify the detention.

E **[6]** That was also a case involving a detention under s. 4 of the Ordinance. The Court of Appeal in that case had considered the question of the proximity of the past criminal activities and the date of detention and held that the two-year gap was, failing an explanation by the minister, too remote to justify the detention.

F **[7]** In this case, the initial detention order was made some 2 1/2 months after the last criminal activity of the applicant. There is therefore no delay, in my view, which can be justiciably considered as staleness or remoteness of the ground of the detention.

G **[8]** In his reply the learned Federal Counsel had adverted to the Federal Court's decision in *Kerajaan Malaysia & Ors. v. Nasharuddin Nasir* [2004] 1 CLJ 81 FC; a case involving a *habeas corpus* application against the executive detention without trial pursuant to s. 8 of the Internal Security Act 1960 (ISA), the principles of which are applicable to this case. *Nasharuddin*'s case discussed the effect of the ouster clause H under s. 3 of the ISA which is in *pari materia* to s. 7C(1) of the Ordinance, which states:

> There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision I made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with any procedural requirement in this ordinance governing such act or decision.

[9] The Federal Court referred to a number of case law authorities which considered the effect of such an ouster clause under various legislations. It came to this conclusion:

> The Federal Court held that the court's jurisdiction to review was ousted by s. 59A on the cardinal principle that where the intention of Parliament was clearly expressed, the duty of the court was to give expression to that intention. Therein Tun Dzaiddin who delivered the judgment said, *inter alia*:
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> > The wider issue is whether statutory provisions of the type stipulated in s. 59A can preclude the court from examining its powers of judicial review over the decision of public decision makers ...
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> > Secondly, in our view, s. 59A is more elaborately expressed and more exclusionary in its scope. Whereas the repealed section provides that an order of the Minister, the director general or the state authority under the Act or any subsidiary legislation shall without prejudice to any provisions giving right to appeal to the Minister in respect of the order of the director general, be final and shall not be called in question in any court on any ground whatsoever, the language in the present s. 59A is explicit with respect to the exclusion of the judicial review by any court of any act or decision made by the Minister, director general or the state authority under the Act except for non-compliance of any procedural requirement. Judicial review under the section is defined to include proceedings commenced by way of an application, writ or any other suit or action mentioned in paragraph (2) of s. 59A. By deliberately spelling out that there shall be no judicial review by the court of any act or decision" of the Minister or the decision-maker except for non-compliance of any procedural requirement, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act.

[10] Similarly here, there is no complaint made by the applicant on the non-compliance by the minister of any procedural requirements. This application was grounded on the non-compliance by the police on certain procedural prerequisites and alleged defects in the forms used. The question whether the legality of the minister's detention order may be hinged upon those procedural omissions and failures, was clearly answered by the Federal Court in *Nasharuddin*, when it made a critical observation on this part of the trial court's judgment:

> With some not too careful officer having blemished the substantive procedural aspect of the detention exercise, it goes without saying that the eventual order issued by the Minister, must similarly be tainted *(Nik Adli bin Nik Abdul Aziz v. Ketua Polis Negara* [2002] 1 CLJ 161). If the roots are bad surely the fruits too will be bad. Some say that if the roots are bad, there will be no trees let alone fruits.

and came to the following conclusion:

> I must confess I am unable to comprehend the rationale behind the learned judge's statement that "if the roots are bad, surely the fruits too will be bad". If it is meant to be an axiomatic proposition for all purposes, then it cannot possibly be true because one can envisage many situations which do not necessarily fall into such a dogmatic characterization especially where human conduct and behaviour is concerned. Quite conceivably, as counsel for the respondent has submitted, the expression is meant to support the proposition that the illegality of the s. 73 detention order had adversely affected the detention order issued by the Minister under s. 8 or conversely, that the s.8 detention order was tainted as a result of the illegality or irregularity of the s. 73 detention order. If that be the case, then it would appear that the learned judge had failed to examine the factual circumstances in the context of the principles enunciated by the Federal Court in Karam Singh. It is not disputed that there is affidavit evidence by the Minister, on the basis of the report submitted to him, was satisfied that the activities of the respondent were a threat to the security of the country. Whether or not the allegations in the said report on which the s.8 detention order was based, were sufficient or relevant, was a matter to be decided solely by the Minister. In this case, he was satisfied, on a subjective basis, that the respondent's activities had threatened national security. It was therefore not open to the court to examine the sufficiency or relevance of the allegations contained in the report. None of these considerations appear in the judgment of the learned judge.

[11] Earlier the Federal Court in its judgment had remarked on the role of the courts in matters of national security and public order in these clear and crisp words:

> It seems apparent from these cases that where matters of national security and public order are involved, the court should not intervene by way of judicial review or be hesitant in doing so as these are matters especially within the preserve of the executive involving as they invariably do, policy considerations and the like.

[12] In passing this judgment the Federal Court went back 35 years into its predecessor's case of *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129, and quoted in agreement this now famous passage from the judgment of Suffian who said:

> When the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is purely a subjective condition, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention, it would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation.
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> Our law is quite different from that of India. First, as already stated, the power of detention is here given to the highest authority in the land, acting on the advice of the Ministers responsible to an accountable in Parliament, not to mere officials. *Secondly, as already stated, here detention, in order to be lawful, must be in accordance with law, not as in India when it must be in accordance with procedure established by law* ... (emphasis added)
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> Finally, in my opinion, it is not for a court of law to pronounce on the sufficiency, relevancy or otherwise of the allegations of fact furnished to him.
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> The discretion whether or not the appellant should be detained is placed in the hands of the Yang di-Pertuan Agong acting on cabinet advice. Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.

[13] In this application, it is therefore outside this court's jurisdiction to now question the detention order of the minister upon whom parliament had made responsible for matters in securing public order, suppression of violence or prevention of crimes involving violence (see preamble of the Ordinance). Even though the power of detention is now placed with the executive through the act of its minister unlike the scenario when Karam Singh was decided, it must be reiterated that this power is not in the hands of officials. As such once the detention order is made pursuant to his subjective satisfaction under s. 4 of the Ordinance, this court, in view of the ouster clause under s. 7C of that Ordinance, is barred from reviewing that order unless it can be shown that there has been non-compliance of any procedural requirement governing such detention. As earlier said, none was shown here.

[14] To rely upon the procedural non-compliance under s. 3 of the Ordinance is now a non-starter in view of what the Federal Court had stated in *Nasharuddin* and the principles enunciated in *Karam Singh.* The detention by the police pending enquiries under s. 3 of the Ordinance even if smudged with procedural irregularities forms no basis to the detention order of the minister under s. 4 and the latter order supercede

A the former, with the effect that those previous irregularities could not now be a basis for this court's consideration in determining whether the minister's order is illegal or not. The actions under ss. 3 and 4 although linked are not inextricably connected and operate independently of each other. (See *Mohamad Ezam Mohd. Noor v. Ketua Polis Negara & Other*
B *Appeals* [2004] 4 CLJ 314).

[15] For these reasons, this application for the issue of a writ of *habeas corpus* was dismissed.

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